

**United States Department of Labor
Employees' Compensation Appeals Board**

**THOMAS J. FLAHERTY, claiming as attorney
for B.W., Appellant**

and

**U.S. POSTAL SERVICE, POST OFFICE,
Carthage, NC, Employer**

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**Docket No. 13-683
Issued: July 9, 2013**

Appearances:
Thomas J. Flaherty, Esq.
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 1, 2013 Thomas J. Flaherty, Esquire, filed a timely appeal from a January 31, 2013 decision of the Office of Workers' Compensation Programs (OWCP) denying his fee application for services performed before OWCP. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this issue.

ISSUE

The issue is whether OWCP abused its discretion by not approving the requested attorney's fee.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On July 30, 2007 the employee, then a 37-year-old recreation specialist, filed a traumatic injury claim for a gunshot wound in his right forearm which occurred on July 26, 2007 while in the performance of duty. On October 11, 2007 OWCP accepted the claim for closed fracture of right upper end of humerus and open wound elbow and right arm without complications. On March 19, 2009 it subsequently accepted temporary aggravation of preexisting depressive disorder and preexisting generalized anxiety disorder.

On November 6, 2012 appellant's counsel, Mr. Flaherty, submitted a claim for legal fees for legal services rendered to the employee pertaining to his July 26, 2007 work injury. He noted that the employee failed to respond to his attempts to contact him regarding approval of his bill. A copy of a September 21, 2008 retainer agreement signed by the employee was submitted along with an itemized description of services performed from September 8, 2008 through November 21, 2011 for a total of \$5,350.00 at \$250.00 per hour.

In a November 21, 2012 letter, OWCP advised the employee that Mr. Flaherty had submitted a fee request and that the retainer agreement authorized him to represent the employee with regard to his workers' compensation claim. It noted, however, that it previously received two other authorizations from the employee which authorized a union representative and his wife to represent him in his claim. The employee was advised that there could only be one representative at any given time and that he needed to withdraw authorization of those individuals he no longer wanted to represent him and specify who was representing him.

In a November 21, 2012 letter, OWCP advised Mr. Flaherty that no action could be taken on his claim for legal fees for services as there was no prior notification from the employee that he had authorized Mr. Flaherty to represent him.

In a December 17, 2012 letter, Mr. Flaherty resubmitted a copy of the September 21, 2008 retainer agreement that the employee signed and renewed his request for approval of his attorney fees.

In a December 27, 2012 letter, OWCP advised Mr. Flaherty that it could not recognize him as representative with regard to the employee's workers' compensation claim because the employee previously authorized another individual to represent him and has not rescinded that prior authorization.

By decision dated January 31, 2013, OWCP denied Mr. Flaherty's fee for services because the employee previously authorized another individual to represent him and had not rescinded that prior authorization.

LEGAL PRECEDENT

Pursuant to 20 C.F.R. § 10.703(a) a representative must submit a fee application to OWCP, which includes an itemized statement identifying his or her hourly rate, the number of hours worked, the specific work performed and the total amount charged for the representation minus administrative costs. The application shall also contain a signed statement from the claimant either agreeing or disagreeing with the amount charged and acknowledging that he or

she, not OWCP, is responsible for paying the fee and other costs.² Pursuant to 20 C.F.R. § 10.700(b) there can only be one representative at any given time and OWCP will not recognize another person as representative until the claimant has withdrawn the authorization of the first individual.

Section 10.701 of Title 20 of the Code of Federal Regulations provide in pertinent part that a claimant may authorize any individual to represent him or her in regard to a claim under FECA. Under definitions, section 10.5(z) states: representative means an individual properly authorized by a claimant in writing to act for the claimant in connection with a claim or proceeding under FECA or this part.³ Section 10.700(c) provides that a properly appointed representative who is recognized by OWCP may make a request or give direction to [OWCP] regarding the claims process, including a hearing.

The Board has held that there is no requirement that OWCP actually have the authorization in hand at the time an authorized representative acts on behalf of a claimant. The representative only needs to show that he (or she) was authorized at the time such action was undertaken.⁴

The sole function of the Board on appeal is to determine whether the action taken by OWCP constituted an abuse of discretion. Generally, an abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.⁵

ANALYSIS

The Board finds that OWCP did not abuse its discretion in denying Mr. Flaherty's fee for services.

The case record shows that Mr. Flaherty submitted a November 6, 2012 fee application, which included an itemized statement identifying his hourly rate, the number of hours worked, the specific work performed and the total amount charged for the representation minus administrative costs. While a copy of the retainer was submitted both before OWCP and on appeal, the application did not contain a signed statement from the employee either agreeing or disagreeing with the requested fee. Moreover, there is no evidence on record that the employee has rescinded his prior authorization of another individual authorized to represent him and authorized Mr. Flaherty instead. According to 20 C.F.R. § 10.700(b) there can only be one representative at any given time. Thus OWCP cannot recognize Mr. Flaherty or another individual as a representative until the employee has withdrawn the authorization of the first individual, which has not been done. As noted, OWCP's implementing regulations regarding representation clearly state that, for a representative to be recognized by OWCP, the claimant

² 20 C.F.R. § 10.703(c).

³ See *David M. Ibarra*, 48 ECAB 218 (1996).

⁴ *Ira D. Gray*, 45 ECAB 445 (1994).

⁵ *W.H.*, Docket No. 10-683 (issued April 22, 2011); *C.H.*, Docket No. 10-987 (issued March 22, 2011).

must submit a signed notice to OWCP appointing the representative.⁶ The employee did not submit a signed, written notice to OWCP authorizing counsel's representation. As there is no showing that Mr. Flaherty is a properly authorized representative, OWCP properly refused to review his November 6, 2012 fee application until the employee filed a proper notice authorizing him to act on his behalf for the purposes of his compensation claim.⁷ Accordingly, OWCP did not abuse its discretion in denying Mr. Flaherty's fee application.

On appeal Mr. Flaherty argues that the employee hired him to represent him before OWCP with regard to his workers' compensation claim on September 21, 2008 and that he performed services at the agreed upon rate between September 21, 2008 and November 11, 2011. He resubmitted copies of evidence previously of record along with new evidence. The Board may not consider new evidence on appeal.⁸ Even though the employee may have authorized Mr. Flaherty to act on his behalf, he cannot be recognized as the authorized representative before OWCP until the employee's prior authorization of representative is rescinded. As noted above, OWCP cannot consider such fees in this case as there is no showing that Mr. Flaherty is the authorized representative in this case.

CONCLUSION

The Board finds that OWCP properly failed to consider Mr. Flaherty's fee for services rendered in appellant's workers' compensation claim.

⁶ 20 C.F.R. § 10.5(z).

⁷ *F.R.*, Docket No. 09-575 (issued January 4, 2010); *Shirley Rhynes*, 55 ECAB 703 (2004).

⁸ *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 9, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board